IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1208

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Offender Rehabilitation,

Petitioner,

vs.

NATHANIEL PRESSLEY,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE COURTS BELOW PROPERLY GRANTED HABEAS CORPUS RELIEF WHERE THE APPLICANT HAD BEEN DENIED THE RIGHT TO FILE A PETITION FOR CERTIORARI IN THE SUPREME COURT OF FLORIDA AS A DIRECT CONSEQUENCE OF THE OPERATION OF A FLORIDA RULE OF COURT COUPLED WITH THE FAILURE OF APPLICANT'S COURT-APPOINTED COUNSEL TO TIMELY INVOKE THE CERTIORARI JURISDICTION OF THE SUPREME COURT OF FLORIDA, AND PETITIONER HAD THUS BEEN DEPRIVED OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

INTRODUCTION

The Secretary of Florida's Department of Offender Rehabilitation has requested this honorable Court to issue its writ of certiorari to review the affirmance by the court below of a judgment granting habeas corpus relief to a state prisoner. Unless otherwise indicated, the term "petitioner" will be used herein to refer to the state prisoner in the context of the litigation in the courts below.

STATEMENT OF THE CASE

On February 17, 1970, the petitioner was charged by indictment with the offense of murder in the first degree. (R. 24).

The petitioner was adjudged insolvent and the court appointed counsel to represent him. The petitioner was tried and the jury returned a verdict of guilty of murder in the first degree with a recommendation of mercy. The petitioner was adjudged guilty and sentenced to life imprisonment in the state penitentiary. (R. 25).

The petitioner was adjudged insolvent for the purpose of appeal and the court appointed counsel to represent him. (R. 26). In an opinion filed on May 2, 1972, the District Court of Appeal of Florida, Third District, affirmed the conviction. (R. 27-34, 116). The Honorable Tillman Pearson dissented, and cited two Florida appellate decisions in support of his conclusion that the trial court had committed reversible error. (R. 34). A petition for rehearing was denied on May 24, 1972, and the mandate issued forthwith. (R. 35).

The petitioner, on May 31, 1972, wrote to the Public Defender, Dade County, Florida, at the suggestion of his court-appointed counsel, and requested that the Public

Defender obtain the petitioner's records from his court-appointed counsel and seek review of the District Court's decision. (R. 36). The Public Defender advised the petitioner that certiorari would be sought on his behalf. (R. 18, 116).

Petitioner's court-appointed counsel delivered the petitioner's files to the Public Defender. A stipulation for substitution of counsel was entered between the petitioner's court-appointed counsel and the Public Defender. (R. 38). On June 28, 1972, the stipulation was filed in the state appellate court in support of a motion to substitute counsel. (R. 37). The motion and stipulation requested that court-appointed counsel be allowed to withdraw, and that the Public Defender be substituted as counsel for petitioner for the purpose of filing a petition for a writ of certiorari in the Supreme Court of Florida on behalf of the petitioner. (R. 37, 38). On July 3, 1972, the state appellate court entered its order accepting the aforementioned stipulation and appointing the Public Defender to represent the petitioner. (R. 39).

Neither petitioner's court-appointed counsel nor the Public Defender filed a timely petition for a writ of certiorari in the Supreme Court of Florida.[1]

On August 9, 1972, the Public Defender filed a petition for a writ of habeas corpus in the Supreme Court of Florida requesting as relief solely that the Court "permit the filing of a belated petition for certiorari." Pressley v. Wainwright, Case # 42, 684. (R. 40). This petition was denied on November 28, 1972. (R. 43).

[1]The respondent has noted that the petitioner's co-defendant filed a petition for writ of certiorari which was denied by the Supreme Court of Florida. Petition at 3. The co-defendant's case is not in any way relevant to this case. The co-defendant's appeal did not involve the same issues as were presented by the petitioner's appeal, and resulted in a unanimous affirmance by the same appellate panel which split regarding the disposition of the petitioner's case. Compare Rhymes v. State, 261 So.2d 527 (Fla. App. 3d 1972); Pressley v. State, 261 So.2d 522 (Fla. App. 3d 1972).

On April 30, 1973, the petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Florida. The federal petition was based upon essentially the same grounds as were contained in the state habeas petition. This petition was denied on the merits.

The petitioner appealed this denial to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the denial of the federal habeas petition on the ground that state remedies had not been exhausted. Pressley v. Wainwright, 493 F.2d at 894, 895 (5th Cir. 1974); (R. 117).

In light of the Fifth Circuit's opinion, the petitioner, on June 12, 1974, filed a motion for leave to file a belated application for certiorari in the Supreme Court of Florida. (R. 44-47). On July 22, 1974, that motion was denied. (R. 48).

On March 19, 1975, the petitioner returned to federal court and filed the petition sub judice. (R. 1-48). The district court issued its rule to show cause and the respondent filed a motion to dismiss and memorandum of law. (R. 49, 53-110). The positions taken by the petitioner and respondent were similar, if not identical, to the positions taken in the initial habeas proceedings. The petitioner filed a second memorandum in support of his petition and in reply to the motion to dismiss. (R. 111-115).

On June 30, 1975, the district court entered an order granting the petitioner habeas corpus relief. (R. 116-118). The district court made the following findings of fact and conclusions of law:

a. The Fifth Circuit, on appeal, had affirmed the initial habeas judgment against the petitioner on exhaustion

grounds. (R. 117).

b. The petitioner had utilized one of the alternatives for exhaustion of state remedies suggested by the Fifth Circuit and had adequately exhausted his state remedies. (R. 117).

c. The Fifth Circuit had elucidated the petitioner's claim and the district court had not fully understood the claim when it was initially presented. (R. 117).

d. "States are not required to establish avenues of appellate review, but once established, these avenues must be kept free of unreasonable distinction that can only impede open and equal access to the Courts." (R. 118).

e. "Petitioner's failure to file the certiorari petition within the time prescribed by law was not occasioned by him. It was occasioned by the State of Florida. Because of his indigency petitioner was forced to rely upon court-appointed counsel. Petitioner expressly manifested his desire to avail himself of the opportunity for the further review of his state court conviction and the failure of the state system to timely act and the resultant frustration of petitioner's right to petition for certiorary (sic) constitutes ineffective assistance of counsel and denied petitioner due process of law and the equal protection of laws as guaranteed by the Fourteenth Amendment of the United States Constitution." (R. 118).

Accordingly, the district court ordered that the State of Florida permit the petitioner to belatedly apply for certiorari review, or in the alternative set aside the petitioner's conviction and grant him a new trial. (R. 118). The district court stated that, if the State failed to comply, the court would be obligated to release the petitioner from the custody resulting from the adjudication and sentence imposed in this case. (R. 118).

On July 10, 1975, the respondent moved for rehearing, which was denied. (R. 119-122, 123). The respondent then appealed to the United States Court of Appeals for the Fifth Circuit. (R. 124).

The Fifth Circuit affirmed the grant of habeas corpus relief. Pressley v. Wainwright, 540 F.2d 818. After reviewing the facts and circumstances of the case, the court below rejected as hypothetical the argument which Florida again relies upon in the petition before this Court:

> The keystone of this argument is the statement that "if" Prisoner's motion to substitute counsel had been denied, he would have been in the same situation as Moffitt. With these two structural points identified, the construction of the state's theory proceeds by arguing that no later than from the time Prisoner received notice of his court-appointed counsel's intention to withdraw from further representation, May 31, until the completed substitution of counsel on July 3, Prisoner was without an attorney. As a consequence, regardless of the substitution of counsel motion on June 28, Prisoner's predicament is identical to Moffitt's: He was without counsel during the filing time and no duty to appoint counsel existed on the state of Florida for discretionary review.
>
> As an arch falling when its keystone is removed, likewise, the State's argument fails. Because Prisoner's motion to substitute was granted, the binding together factor of this argument is nonexistent. Furthermore, the base of the argument gives way under close scrutiny. No issue regarding failure to provide discretionary review exists. The record indicates that Prisoner's court-appointed recommended that he ask the Public Defender to undertake his representation and that the Public Defender agreed to do so within the thirty day period in question. Realization of these two defects in the argument relegates it to the status of a "whims of fate" argument relying on the remaining proposition that Prisoner was without an attorney from at least May 31 to July 3. Unlike Shakespear's epithet "Let wyrd be done", adequate representation by counsel requires more than the unknown path fate provides. 540 F.2d at 820-821. (Footnotes omitted.)

The findings of fact and conclusions of law which were the basis for the relief afforded by the district court were outlined by the court below as follows:

> (1) Prisoner's failure to timely petition for certiorari was not occasioned by him.
> (2) The failure was occasioned by the State of Florida.
> (3) Because of his indigency, Prisoner was forced to rely on court-appointed counsel.
> (4) Prisoner expressed his desire to seek further review of his conviction.
> (5) Failure of the State system to timely act and the resulting frustration of Prisoner's right to seek a writ of certiorari constitutes ineffective assistance of counsel denying Prisoner due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution. 540 F.2d at 821 n. 11.

In affirming the judgment of the district court, the Fifth Circuit found that the record reflected sufficient evidence to support the district court's determination that the petitioner-appellee had been denied effective assistance of counsel. 540 F.2d at 821.

ARGUMENT

THE COURTS BELOW PROPERLY GRANTED HABEAS CORPUS RELIEF WHERE THE PETITIONER HAD BEEN DENIED THE RIGHT TO FILE A PETITION FOR CERTIORARI IN THE SUPREME COURT OF FLORIDA AS A DIRECT CONSEQUENCE OF THE OPERATION OF A FLORIDA RULE OF COURT COUPLED WITH THE FAILURE OF PETITIONER'S COURT-APPOINTED COUNSEL TO TIMELY INVOKE THE CERTIORARI JURISDICTION OF THE SUPREME COURT OF FLORIDA, AND PETITIONER HAD THUS BEEN DEPRIVED OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

Reasonable access to the courts is a constitutional imperative. It is a fundamental principle that "access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." Johnson v. Avery, 393 U.S. 483, 485 (1969). Hooks v. Wainwright, 352 F.Supp. 163, 168 (M.D. Fla. 1972).

> [I]t is clear that unless an indigent inmate can reach the very threshold of the courts, all of the normal guarantees of due process do not come into play. Although he may have a claim which would entitle him to relief, absent the invocation of the judicial machinery the potential relief is merely a hollow promise. Thus, the inadequacy and insufficiency of the legal services provided indigent inmates effectively denies them the due process of law.

As repeatedly recognized by the court of appeals, the instant claim arises from a denial by the State of petitioner's right to file a petition for a writ of certiorari in the Supreme Court of Florida. Pressley v. Wainwright, 540 F.2d 818; 493 F.2d at 896. This denial is a direct consequence of the operation of a Florida rule of court coupled with the failure of petitoner's court-appointed counsel to timely act on his client's behalf.

A. The Application Of Florida Appellate Rule 4.5 By The Supreme Court Of Florida So As To Foreclose Petitioner's Right To Petition For Certiorari Review Deprived Petitioner Of Due Process And Equal Protection As Guaranteed By The Fourteenth Amendment To The Constitution Of The United States.

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The jurisdiction of the Supreme Court of Florida to review decisions of district courts of appeal is established by Article V of the Florida Constitution. Florida Appellate Rules 2.1(a)(5)(b) and 4.5(c)(6), promulgated by the Florida Supreme Court, parallel the provisions of Article V.

Article V § 4(2) of the Florida Constitution (1885), which was in effect at the time of the petitioner's application, provided in pertinent part:

> The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.[2]

Rule 4.5(c)(6), Fla.App.R., provides in pertinent part:

> Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision.

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[2]Article V was amended effective January 1, 1973. Section 3(b)(3) relating to certiorari jurisdiction now provides for review by the Supreme Court of a decision which conflicts with "a decision of any district court." This modification does not, however, have any bearing on the outcome of the case at bar.

> The petition for certiorari under this rule shall be filed in the Supreme Court within 30 days from the rendition of the order, decision or judgment of the district court of appeal.
>
> * * *
>
> The Supreme Court shall consider the petition . . . and if the Court determines that it has jurisdiction, the said petition shall be granted; otherwise the same shall be denied or dismissed.

Thus, the Florida Appellate Rules allow a party to file a petition for a writ of certiorari in the Florida Supreme Court to review "any decision of a district court of appeal", provided that such petition is filed with the thirty day time limit. The right is absolute except for this time limitation.

The Florida Appellate Rules do not establish a prerequisite showing of jurisdiction or merit to the filing of a petition for a writ of certiorari.[3] If, after consideration of a petition, the Supreme Court of Florida finds itself to be without jurisdiction or the petition to be without merit, the petition is dismissed or the writ is discharged. Fla.App.R. 4.5 (c)(6). See, e.g., State v. Reynolds, 238 So.2d 600 (Fla. 1970).

The State's denial of petitioner's right to file a petition for certiorari review due to the failure of his court-appointed counsel to file within the thirty day limit established by a Florida rule of court constituted a violation of the petitioner's right to due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment

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[3]The petitioner's attempt to invoke the certiorari jurisdiction of the Supreme Court of Florida was in "good faith." 493 F.2d 895. The dissent to the affirmance of petitioner's conviction expressly sets forth two decisions of other district courts of appeal, which decisions, in the opinion of the dissenting judge, conflicted with the affirmance. Thus, the decision itself indicates that the state certiorari petition would have been meritorious. Pressley v. State, supra at 527.

to the Constitution of the United States.[4]

The present case is controlled by a long line of decisions of the Supreme Court of the United States in which the Court held constitutionally invalid a wide range of state procedures which denied indigent defendants the benefit of an existing system of appellate review. In Lane v. Brown, 372 U.S. 477 (1963), the Court held violative of the Equal Protection Clause, an Indiana procedure which permitted the public defender at will to deprive an indigent of the right to appeal from the denial of a writ of coram nobis. The Court in Lane, reviewed its previous decisions:

> In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, the Court held that a State with an appellate system which made available trial transcripts to those who could afford them was constitutionally required to provide "means of affording adequate and effective appellate review to indigent defendants." Id., at 20, 76 S,Ct. 591. "Destitute defendants," the Court held, "must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Id., at 19, 76 S.Ct. 591. In Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209, involving a $20 fee for filing a motion for leave to appeal a felony conviction to the Supreme Court of Ohio, this Court reaffirmed the Griffin doctrine, saying that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." Id., at 257, 79 S.Ct. 1168. In Smith v.

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[4]Cf. Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972).

Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39, the Court made clear that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state post-conviction proceedings. "Respecting the State's grant of a right to test their detention," the Court said, "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." Id., at 714, 81 S.Ct. 898. In Eskridge v. Washington Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269, the Court held invalid a provision of Washington's criminal appellate system which conferred upon the trial judge the power to withhold a trial transcript from an indigent upon the finding that "justice would not be promoted . . . in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein," Id., at 215, 78 S.Ct. 1062. There it was said that "[t]he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." Id., at 216, 78 S.Ct. 1062.

The present case falls clearly within the area staked out by the Court's decisions in Griffin, Burns, Smith and Eskridge. To be sure, this case does not involve, as did Griffin, a direct appeal from a criminal conviction, but Smith makes clear that the Griffin principle also applies to state collateral proceedings, and Burns leaves no doubt that the principle applies even though the State has already provided one review on the merits.

In Eskridge the Court held constitutionally invalid a provision which permitted a trial judge to prevent an indigent from taking an effective appeal. The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone does not meet constitutional standards. 372

U.S. at 483- 485, 83 S.Ct. at 772-773. (Emphasis added.)

See also Anders v. California, 386 U.S. 783 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967); Roberts LaVallee, 389 U.S. 40 (1967).

Petitioner's right to file a petition for a writ of certiorari in the Florida Supreme Court stands on no less footing than Smith's right of access to state post-conviction proceedings and Lane's access to appellate review thereof, Burn's right of access to the second phase of state appellate procedure, and Griffin's and Eskridge's right to a trial transcript for appellate review.

On May 31, 1972, following affirmance of petitioner's conviction by the District Court of Appeal of Florida on May 24, 1972, and within the thirty day time period provided by Florida Appellate Rule 4.5, petitioner wrote to the Public Defender for the Eleventh Judicial Circuit of Florida, and requested that Public Defender represent him in seeking review of the District Court's decision. (R. 36). The letter stated that the petitioner had been referred to the Public Defender for this purpose by his court-appointed counsel. Petitioner had been previously adjudged insolvent for the purpose of appeal and, therefore, had to rely upon court-appointed counsel in order to take advantage of the opportunity to have the decision of the District Court reviewed by the Supreme Court of Florida. (R. 26). The Public Defender advised the petitioner that certiorari would be sought on his behalf. (R. 18, 116).

It was not until after the thirty day limit established by Rule 4.5 had elapsed that the Public Defender substituted as counsel for petitioner by order of the Distrcit Court of Appeal. (R. 39, 117). No petition for a writ of certiorari had been filed by petitioner's court-appointed counsel or by the Public Defender within the thirty day period. (R. 9, 41, 117).

Petitioner's failure to file the certiorari petition within the time provided by law was occasioned solely by the inaction of petitioner's court-appointed counsel, upon whom petitioner was forced to rely because of his indigency, despite petitioner's expressly manifested desire to avail himself of the opportunity for further state court review of his conviction. (R. 15, 17, 118). See also 540 F.2d at 821 n. 11; 493 F.2d at 895.

The Public Defender initially undertook to vindicate petitioner's frustrated right to certiorari review of his conviction by filing an original petition for a writ of habeas corpus in the Florida Supreme Court. This remedy was invoked in accordance with the decision of the Supreme Court of Florida in Baggett v. Wainwright, 229 So.2d 239 (1969), which expressly adopted this method as the appropriate means to secure belated appellate review which has been frustrated by state action. See also Thompson v. Dilley, 275 So.2d 234 (Fla. 1973). Subsequent to and in accordance with the Fifth Circuit's ruling in this cause, the petitioner filed a motion for leave to file a belated application for certiorari in the Supreme Court of Florida. This motion met the same fate as the petitoner's initial request to that Court.

Thus, the application by the Supreme Court of Florida of the thirty day limitation on filing contained in Rule 4.5 under the circumstances sub judice constituted a denial of the petitoner's right to due process of law and equal protection of the laws.

B. The Failure Of Petitoner's Court-Appointed Counsel To Timely Invoke The Certiorari Jursidiction Of The Supreme Court Of Florida, After Agreeing To Do So With The Petitioner, Rendered Said Counsel's Assistance Ineffective And Deprived The Petitioner Of Due Process Of Law And Equal Protection Of The Laws.

Indigent defendants in criminal proceedings are constitutionally entitled to effective assistance from

state-appointed counsel. Anders v. California, supra; Douglas v. California, 372 U.S 353 (1963).

It is well-established that the failure of counsel to timely invoke a court's appellate jurisdiction, or place his client in a position to do so, renders his assistance ineffective and deprives the accused of his constitutional rights. Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971).

In Hall v. Wainwright, 441 F.2d 391 (5th Cir. 1971), the court affirmed the issuance of a writ of habeas corpus where petitioner's court-appointed counsel failed to file a timely notice of appeal. The court noted that the failure of the Public Defender, a state agency, to act "constituted state action which effectively denied to the petitioner his constitutionally protected right to appeal." Id. at 393.

In Atilus v. United States, 406 F.2d 694, 697 (5th Cir. 1969), the court noted that the failure of non-appointed counsel to notice an appeal is tantamount to denying an accused the right to counsel at a vital state of the proceedings:

> [W]here the trial ends with appointed counsel failing to take the action desired by the accused by filing a notice of appeal and the convicted person is therefore actually without the aid of counsel when the statutory time of appeal expires, this court has had no difficulty in remedying this defect by permitting a late filing.

In Lumpkin v. Smith, supra, the court reversed a denial of a state prisoner's petition for habeas corpus relief on the basis tht the petitioner had been denied the effective assistance of counsel. The court noted that it was well-established that court-appointed counsel must advise a defendant of "his right to appeal, the procedure and time limits involved, and of his right to appointed counsel on appeal." Id. at 1085.

In the instant case, petitioner had court-appointed counsel to represent him both a trial and on appeal. Court-appointed counsel then withdrew from the case, and the Public Defender was simultaneously appointed to represent the petitioner. This substitution of counsel was for the express purpose of filing a petition for a writ of certiorari in the Supreme Court of Florida. The Public Defender had advised petitioner that a petition would be filed on his behalf. Thus, petitioner's reliance on the Public Defender coupled with counsel's failure to timely invoke the jurisdiction of the Supreme Court of Florida effectively denied the petitioner his right to petition for a writ of certiorari. In Anders v. California, supra at 739-741, and Lane v. Brown, supra at 485, this Court declared that court-appointed counsel may not directly deprive an indigent defendant of his right to appellate review. See also Entsminger v. Iowa, supra at 752. Logic, as well as the Constitution, requires the conclusion that court-appointed counsel may not constitutionally do indirectly that which he may not do directly.

The failure of petitioner's court-appointed counsel to timely act and the resultant frustration of petitioner's otherwise absolute right to petition for certiorari review constituted ineffective assistance of counsel and denied petitioner due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution. (R. 118).

The consequences of petitioner's counsel's failure to timely invoke the certiorari jurisdiction of the Supreme Court of Florida are as serious as those flowing from counsel's failure to timely note appeals in Hall and Atilus. Therefore, the relief afforded the petitioner by the court below, which

relief is equivalent to that granted in Hall and Atilus, is entirely appropriate.

C. The Failure Of The State To Provide A Means Of Relieving The Petitioner From The Consequences Of Court-Appointed Counsel's Failure To Timely Perfect Petitioner's Right To Petition For Certiorari Review, While Providing Relief From Similar Derelictions Of Counsel Relating To Direct Appeals And Appeals From Denials Of Post-Conviction Relief, Deprived The Petitioner Of Equal Protection Of The Laws.

The petitioner's equal protection claim, in essence, was that Florida must provide a means to relieve him from the consequences of court-appointed counsel's failure to timely perfect petitioner's right to seek certiorari review because Florida provided relief from similar derelictions of counsel relating to direct appeals and appeals from denials of post-conviction motions. The federal district court, in its order granting habeas relief, held that the petitioner had been denied equal protection of the laws, as well as due process. In affirming the district court, the Fifth Circuit only discussed the due process factor, but reiterated the two bases relied upon by the district court. 540 F.2d at 821 n. 11.

In addition to the federal courts, the Supreme Court of Florida has recognized and applied the Douglas principle, and established that habeas corpus is the appropriate remedy for the deprivation of indigent defendants' appellate rights by the State. Baggett v. Wainwright, 229 So.2d 239, 241 (Fla. 1969); Powe v. State, 216 So.2d 446 (Fla. 1968). See also State v. Wooden, 246 So.2d 755 (Fla. 1971). Although these three cases relate to belated direct appeals, Florida courts have declared that the same procedure is appropriate where the defendant has been deprived of an appeal from post-conviction proceedings. Flores v. Wainwright, 240 So.2d 816 (Fla. App. 2d 1970); O'Malley v. Wainwright, 237 So.2d 813, 817 (Fla. App. 2d 1970).

The State has established a means of relieving defendants from the consequences of court-appointed counsel's failure to timely perfect their right to direct appeals and appeals from denials of post-conviction petitions pursuant to Fla.R.Crim.P. 3.850. However, the State has refused to relieve the petitioner from the consequences of his court-appointed counsel's failure to timely perfect the petitioner's right to petition for certiorari review. This refusal by the State creates two classes of defendants seeking appellate review of criminal proceedings: 1) those defendants seeking relief from the ineffective assistance of counsel resulting in the denial of a direct appeal or an appeal from post-conviction proceedings and, 2) those defendants seeking relief from the ineffective assistance of counsel resulting in the denial of certiorari review. The State discriminates by withholding habeas corpus relief, in the form of belated appellate review, from the second class while extending such relief to the first.

In that these classifications touch upon the fundamental right of effective assistance of counsel, and right of access to courts, the classifications must promote a compelling state interest. Mayer v. City of Chicago, 404 U.S. 189 (1971); Cipriano v. City of Houma, 395 U.S 701 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971). Cf. Roe v. Wade, 410 U.S. 113 (1973). However, these classifications fail to promote any legitimate state interest whatsoever.

Even if the less stringent equal protection standard of rationality were applicable in the case at bar, these classifications would still fail to pass constitutional muster. In Rinaldi v Yeager, 384 U.S 305 (1966), this Court struck down a New Jersey statute which required that an incarcerated indigent

defendant reimburse the state for the cost of a trial transcript, but which statute did not impose this requirement upon those defendants who paid a fine or were placed on probation. In striking down the statute, the Court noted that the Equal Protection Clause requires "some rationality in the nature of the class singled out" and that "distinctions that are drawn have 'some relevance to the purpose for which the classification is made'." Id. at 309. Clearly these standards are not met when the State requires applicants for certiorari review to bear the consequences of the deprivation of a fundamental right, such as the right to the effective assistance of counsel, while relieving applicants for direct appeal or post-conviction appellate review of this burden. This discrimination is not rational and bears no relationship to any constitutionally acceptable purpose. See also Eisenstadt v. Baird, 405 U.S 438, 446-447, n. 7 (1972); Williams v. Illinois, 399 U.S. 235 (1970).

The claim sub judice is a direct result of precisely the type of "unreasoned distinction" to which the Court referred in Rinaldi, supra at 310-311:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 768, 9 L.Ed.2d 892; Draper v. State of Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899.

The relief afforded the petitioner by the courts below is appropriate because it had the salutary effect of eliminating this invidious discrimination and infringement upon the

petitioner's fundamental rights.

D. Florida's Argument That The Courts Below Erred In Granting Habeas Relief Because The Record Fails To Establish A Deprivation Of A Constitutional Right And That The Decision Of The Court Below Conflicts With Ross v. Moffitt Is Without Foundation In Law Or Fact.

In contrast with the Secretary's argument, this case presents no issue regarding the right to the appointment of counsel or the failure of counsel to advise his client of the possibility of discretionary review. Petition at 9-10. The Secretary recognizes that, in contrast with Moffitt's case, counsel was appointed for the petitioner. Petition at 7. The Secretary, however, attempts to dismiss this crucial fact by stating that this difference creates no distinction at all.[5] Petition at 7.

The findings of fact and conclusions of law which were the basis for the relief afforded by the district court were outlined by the court below as follows:

> (1) Prisoner's failure to timely petition for certiorari was not occasioned by him.
> (2) The failure was occasioned by the State of Florida.
> (3) Because of his indigency, Prisoner was forced to rely on court-appointed counsel.
> (4) Prisoner expressed his desire to seek further review of his conviction.
> (5) Failure of the State system to timely act and the resulting frustration of Prisoner's right to seek a writ of certiorari constitutes ineffective assistance of counsel denying Prisoner due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution. 540 F.2d at 821 n. 11.

[5]The petition is misleading insofar as it indicates that Moffitt's counsel was unable to secure "permission to file" a petition for certiorari. Petition at 9. Moffitt reflects that the North Carolina courts refused to provide appointed counsel to represent Moffitt on certiorari. 417 U.S. at 600, 603-604 (1974).

In affirming the judgment of the district court, the court below found that the record reflected sufficient evidence to support the district court's determination that the petitioner-appellee had been denied effective assistance of counsel. 540 F.2d at 821.

This case involves a question of effective assistance of counsel, rather than a question of the right to the appointment of counsel. The petitioner was represented by court-appointed counsel at all times relevant to the case sub judice. As averred and demonstrated to the satisfaction of the courts below, the state trial court appointed counsel to represent the petitioner at trial and then for purposes of appeal. (R. 8, 26). Petitioner's counsel then requested the state appellate court to permit him to withdraw and to substitute the local public defender as counsel for the petitioner for the explicit purpose of filing a writ of certiorari in the Supreme Court of Florida. (R. 37-38). The state appellate court entered an order which simultaneously granted leave to withdraw and substituted the public defender as counsel for the petitioner. (R. 39). Thus, the finding of the courts below is quite adequately supported by the record.

The issue here is whether the petitioner may be deprived of his state created right to file a petition seeking to invoke the certiorari jurisdiction of the Supreme Court of Florida as a direct result of the ineffectiveness of appointed counsel and the enforcement by the Supreme Court of Florida of its procedural rules. It is the petitioner's position that the courts below properly resolved this issue in the negative. This is especially apparent in light of the assurances the petitioner received from appointed counsel that the petitioner's right to review would be protected

and exercised, and the petitioner's good faith reliance on those assurances.[6] The assistance rendered by counsel was clearly ineffective. See West v. State of Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960).

The Due Process Clause limits the circumstances under which an individual may be deprived of any entitlement, even though the entitlement may be a mere privilege. Goldberg v. Kelly, 397 U.S. 254, 262 (1970). The entitlement certainly need not be based upon a constitutional right in order to be afforded due process protection. See, e.g., Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 735-736 (1975); Wolff v. McDonald, 418 U.S. 539 (1974); Morrisey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, supra.

"[T]here is no federal constitutional right to state appellate review of state criminal proceedings." Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 1175 (1975). This proposition applies with equal force to direct appeals and to discretionary procedures.

Once Florida established certiorari as an avenue of appellate review, however, Florida became responsible for keeping that avenue free of unreasoned distinctions that can only impede open and equal access to the courts.[7] Cf. Rinaldi

[6] When this case was initially before the court below, that court explicitly recognized that the problem was not the fault of the petitioner, and had occurred because of a belated court order appointing counsel and despite the good faith intention of the petitioner to seek review. 493 F.2d at 895. The second time this case was before the court below, the court expressly relied upon findings of fact made by the district court, which findings reemphasize that the petitioner was without blame and the state system was responsible for the frustration of the petitioner's rights. 540 F.2d at 821 n. 11.

[7] Although Florida may not have been constitutionally obligated to provide certiorari review, it has chosen to do so. Pursuant to the Constitution of the State of Florida and the Florida Appellate Rules, the petitioner had an unconditional right to file a timely petition requesting the Supreme Court of Florida to exercise its certiorari jurisdiction. Fla. Const. Art. V § 3(b)(3); Fla.App.R. 2.1(a)(5)(b), 4.5(c).

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v. Yeager, supra at 310-311. Florida's denial of the petitioner's right to file for certiorari review through ineffective assistance of counsel, and Florida's subsequent refusal to remove the obstacles created by its rules, contrary to what the State has done in similar situations, constitutes a denial of due process and equal protection. Cf. Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. en banc 1975).

Obstacles to appellate review which might otherwise have resulted in deprivations of due process have been the object of remedial action by both the federal and Florida courts. The Supreme Court Rules anticipate problems in this area and explicitly provide means to insure that parties are not arbitrarily denied access to the Court. The normal period in which a party may file a petition is a reasonable ninety days, compared with Florida's thirty. Supreme Court Rule 22(1). Significantly, where good cause is shown, the normal time for applying may be extended for a period not exceeding sixty days. Supreme Court Rule 22(1). See also Supreme Court Rule 22(2). Florida's rule, in contrast, is written and applied in such a rigid manner that it must from time to time arbitrarily deny a proper party access to the Supreme Court of the state.

Also, as noted by the Fifth Circuit, the Supreme Court, in Schreiner v. United States, 404 U.S. 67 (1971), remanded the case to the court of appeals with instructions to re-enter its judgment in connection with efforts to certiorari review of the judgment in the Supreme Court. 493 F.2d 894, 895 (5th Cir. 1974).

In Lacaze v. United States, 457 F.2d 1075 (5th Cir. 1972), the court exercised its supervisory power to overcome obstacles in the way of obtaining access to certiorari review in the Supreme Court of the United States. The court observed:

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> It is by no means unusual for courts to grant out-of-time relief to a defendant in order that he may be allowed to use the appellace process previously denied him. Id. at 1079.

The Fifth Circuit has in numerous cases granted habeas corpus relief to state prisoners who have been deprived of access to appellate courts by ineffective assistance of counsel. See, e.g., Daniels v. State of Alabama, 487 F.2d 887 (5th Cir. 1973); Hall v. Wainwright, 441 F.2d 391 (5th Cir. 1971); Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971).

The Florida courts have fashioned a remedy for the failure of court-appointed counsel to timely seek review in cases involving appeals from denials of collateral relief, as well as from denials of direct appeals. See, e.g., Baggett v. Wainwright, 229 So.2d 816 (Fla. App.2d 1970); O'Malley v. Wainwright, 237 So.2d 813 (Fla. App.2d 1970).

The grant of habeas corpus relief and affirmance by the courts below was in keeping with the well established principles recognized in these cases and was eminently correct. As this Court recently reiterated, "Regulations and practices that unjustifiably obstruct. . . the right of access to the courts are invalid." Procunier v. Martinez, 416 U.S. 396, 419 (1974).

CONCLUSION

Ross v. Moffitt held that there is no constitutional right to appointed counsel to seek post-appeal discretionary review in either a state forum or the Supreme Court of the United States. Petition at 6. The North Carolina courts had refused to provide counsel for Moffitt.

In contrast, in the instant case, counsel was appointed. The courts below have held that the assistance

rendered by counsel was ineffective and deprived your respondent of due process of law. There is no conflict whatsoever between the instant case and Moffitt.

For the foregoing reasons your respondent respectfully requests this honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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